ABDUL JALAL AHMAD & ORS

v.

PEGAWAI PEMEGANG HARTA CAWANGAN NEGERI SEMBILAN & ORS

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[CIVIL SUIT NO: 22-29-2002]
27 SEPTEMBER 2004

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Whether bankrupt plaintiffs obtained sanction of Official Assignee - Whether plaintiffs had necessary locus standi to commence action - Bankruptcy Act 1967, s. 38(1)(a)*

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Whether writ and statement of claim contravened ss. 35(1) and 37(1) Legal Profession Act 1976 - Legal Profession Act 1976, s. 37(1)(a)*

CIVIL PROCEDURE: *Appeal - Notice of - Whether irregular - Whether defendants prejudiced in any way*

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Triable issues - Period of limitation - Allegations of fraud - Whether serious questions of law existed - Limitation Act 1953, ss. 6(1)(a), 9, 29(a), (b)*

CIVIL PROCEDURE: *Striking out - Writ and statement of claim - Grounds for - Rules of the High Court 1980, O. 18 r. 19(1)(b), (c), (d)*

CIVIL PROCEDURE: *Appearance - Unconditional appearance - Whether defendants precluded from striking out plaintiffs' claim*

CIVIL PROCEDURE: *Judgment - Default of defence - Setting aside - Whether judgment in default of defence irregular - Rules of the High Court 1980, O. 19 r. 7(1), (3)*

This was an appeal in encl. 32 by the plaintiffs against the decision of the learned registrar allowing: (i) the 3rd and 4th defendants' applications in encls. 23 and 11 respectively to strike out the plaintiffs' writ and statement of claim pursuant to O. 18 r. 19(1)(b), (c) or (d) of the Rules of the High Court 1980 ('the RHC'); and (ii) the 3rd defendant's application in encl.

30 to set aside the judgment in default of defence obtained by the plaintiffs against the 3rd defendant. In encls. 11 and 23, the contentious issues were: (i) whether the plaintiffs, who had been adjudged bankrupts without any sanction from the Official Assignee's office, had *locus standi* in this action; (ii) whether the writ and statement of claim filed by the plaintiff were not allowed on the strength of ss. 35(1) and 37(1) of the Legal Profession Act 1976 ('the LPA'); (iii) whether the notice of appeal in encl. 32 was irregular as it was filed by the 3rd plaintiff when there were three unrepresented plaintiffs, and since there were three separate orders, there should have been three separate notices of appeal against each order; (iv) whether there were serious questions to be tried; (v) whether the principles governing O. 18 r. 19(1)(b), (c) or (d) of the RHC had been satisfied; and (vi) the effect of an entry of unconditional appearance. In respect of encl. 30, the arguable issue was whether or not the plaintiffs' entry of judgment in default of the 3rd defendant's defence was valid.

Held (partially allowing the appeal):

[1] When the learned registrar made the orders on 27 January 2003, the plaintiffs had not obtained the Official Assignee's sanction. However, *vide* a letter dated 27 August 2003, the plaintiffs obtained such sanction from the Official Assignee's office, and in the circumstances, s. 38(1)(a) of the Bankruptcy Act 1967 had been satisfied. Thus, the plaintiffs had the necessary *locus standi* to commence this action. (p 299 e-f)

[2] In respect of the plaintiffs' writ and statement of claim and the notice of appeal in encl. 32 which were filed by the third plaintiff on his own behalf and also on behalf of the other two plaintiffs, the 1st plaintiff, as a party, was entitled to file these documents on his own behalf as this was expressly allowed as an exception to s. 37(1)(a) of the LPA. (p 299 g)

[3] A proper perusal of the notice of appeal revealed that it had referred to all three orders made in the three enclosures in which case there was no reasonable likelihood of the defendants being prejudiced in any way whatsoever. (p 300 f)

[4] The issues as to whether the plaintiffs' action may be construed as an action to recover land within the ambit of s. 9 of the Limitation Act 1953 ('the Act') which sets a 12-year limitation period, or if it was founded on a contract or tort so as to attract the six-year limitation period under s. 6(1)(a) of the Act, were serious questions of law which could only be heard after hearing *viva voce* evidence at the trial. Further, there were serious allegations of fraud that had been particularised which were to be resolved after a full hearing, in order to determine, *inter alia*, the application of the limitation period under s. 29(a) or (b) of the Act. (p 301 a-b)

[5] On the facts, the plaintiffs' action was not scandalous in the sense of being wholly unnecessary or irrelevant and, similarly, it could not be said to be frivolous or vexatious in the sense of being obviously unsustainable. Neither was it embarrassing nor an abuse of the process of the court as the plaintiffs herein had a legitimate right to initiate and pursue the action against the defendants. Hence, the specific requirements and terms contained in O. 18 r. 19(1)(b), (c) or (d) of the RHC had not been satisfied. (p 302 a & e-f)

[6] The defendants, who had filed their unconditional appearance, had thereby deprived themselves of the right to invoke O. 18 r. 19 of the RHC (*Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* followed). (p 303 d)

[7] Under O. 19 r. 7 of the RHC, where the plaintiff makes a claim of a description not mentioned in O. 19 r. 2 to r. 5 of the RHC, the plaintiff may apply to the court for judgment in default of defence, and on the hearing of the application, the court shall give such judgment as the plaintiff appears entitled to on their statement of claim. However, since the plaintiffs had failed to invoke O. 19 r. 7(1) and (3) of the RHC in order to obtain judgment in default of defence against the 3rd defendant, the judgment was irregular and ought to be set aside *ex debito justitiae*. (p 304 c & f)

[Encls. 11 and 23 set aside; encl. 30 affirmed.]

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 CA ***(refd)***

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(foll)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Boey Oi Leng v. Trans Resources Corporation Sdn Sdn [2002] 1 CLJ 405 HC ***(refd)***

Knowles v. Roberts [1888] 38 Ch D 263 ***(refd)***

Leong Peng Kheong & Anor v. Dawntree Properties Sdn Bhd [2002] 1 CLJ 602 HC ***(refd)***

Lian Keow Sdn Bhd v. Chelliah Paramjothy & Anor [1988] 1 CLJ 57; [1988] 1 CLJ (Rep) 729 HC ***(refd)***

Mrs Kok Wee Kiat v. KLSE & Ors [1979] 1 MLJ 171 ***(refd)***

Roslan Abdullah v. New Zealand Insurance Co Ltd [1981] 2 MLJ 324 ***(refd)***

Sarjit Singh Khaira v. Government of the State of Sarawak & Anor [1990] 2 CLJ 95; [1990] 3 CLJ 59 HC ***(refd)***

Stephen Kalong Ningkan v. Tun Abang Hj Openg & Tawi Sli (No 2) [1967] 1 MLJ 46 ***(refd)***

Tractors Malaysia Bhd v. Tio Chee Hing [1975] 2 MLJ 1 ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 33(1), 38(1)(a), (2)

Legal Profession Act 1976, ss. 35(1), 37(1)(a)

Limitation Act 1953, ss. 6(1)(a), 9, 29(a), (b)

Rules of the High Court 1980, O. 8, O. 18 rr. 1, 19(1)(b), (c), (d), O. 19 rr. 2, 3, 4(a), (b), 5(1), 7(1), (3), O. 32 r. 1, O. 83 r. 1

Other source(s) referred to:

Malaysian High Court Practice, 1998, MLJ Desk Edn, p 510, para 18.19.6

For the 3rd defendant - Gurdit Singh; M/s Nassir & Co
For the 4th defendant - Ahmad Rosdi; M/s Ahmad Rosdi & Co
For the plaintiffs - Unrepresented

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal in encl. (32) lodged by the plaintiffs to me as judge in chambers against the decision of the learned registrar who had on 27 January 2003 allowed with costs:

1. the fourth defendant's and the third defendant's applications in encl. (11) and encl. (23) respectively, to strike out the plaintiffs' writ and statement of claim dated 18 February 2002, pursuant to O. 18 r. 19(1)(b), (c) or (d) of the Rules of the High Court 1980; and

2. the third defendant's application in encl. (30) to set aside the judgment in default of defence obtained by the plaintiffs on 14 July 2003 against the third defendant.

(For brevity and convenience, all references to an order and a rule hereinafter are references to that order and rule of the Rules of the High Court 1980)

Factual Background

1. Enclosure (11)

The fourth defendant's application by way of summons in chambers in encl. (11) is supported by his own affidavit alleging that on 1 May 1992, he was appointed a director of Seremban Bumi Tayar Sdn Bhd ("the company") in order to financially assist the company which however showed no improvement.

On 25 September 1996, the fourth defendant resigned as a director of the company. During his tenure as such director, the fourth defendant said that he had never signed any of the company's documents in that capacity, as a result of which, the writ and statement of claim was wrongly commenced against him, and that the plaintiffs who have been adjudged bankrupts without any sanction from the official assignee's office, had no *locus standi* in this action.

He added that the writ issued on 18 February 2002 and based on fraud allegedly committed in 1992 is statute-barred.

In his affidavit in reply, the third plaintiff alleged that the fourth defendant should have raised the issue of sanction in the statement of defence and that the silence of the first defendant who is the official assignee is evidence of waiver. He added in his further affidavit that such sanction has been obtained by the plaintiffs on 27 August 2003, in which case the plaintiffs have *locus standi* in an action based on fraud.

The fourth defendant also alleged that the plaintiffs' action is statute-barred.

2. Enclosure (23)

This application by way of summons in chambers was supported by the third defendant's affidavit alleging that the plaintiffs had been adjudged bankrupts and hence in the absence of sanction have no *locus standi* to commence this action which he also alleged is statute-barred on the same grounds as in encl. (11) above.

The third defendant said that he has never signed any of the company's documents including letters of guarantee. He added that the company is a separate legal personality and that allegations of fraud were not particularised.

The third plaintiff responded in his affidavit in reply, alleging that the plaintiffs have *locus standi* and that there are serious questions to be tried. He said that the action is not statute-barred.

3. Enclosure (30)

This summons in chambers filed by the third defendant sought to set aside the judgment in default of defence dated 14 January 2003, on the ground, *inter alia*, that declaratory relief could not be given by way of judgment in default of defence and that on 19 November 2002, the learned registrar has made an interim order that the plaintiffs could not enter judgment in default of defence against the third defendant until the third defendant's application to strike out the plaintiffs' writ and statement of claim has been heard and that it is an abuse of the process of the court. There was no affidavit in support.

Submissions By Parties And Decision Of The Court

1. Enclosures (11) and (23)

(1) Sanction and locus standi

The plaintiffs who are unrepresented submitted that they have obtained the necessary sanction and hence have *locus standi.*

It was also argued that the defendants who have entered unconditional appearance have waived their right to invoke O. 18 r. 19, relying on *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors.* [1995] 1 CLJ 461 FC; and *Leong Peng Kheong & Anor v. Dawntree Properties Sdn Bhd* [2002] 1 CLJ 602.

The third and the fourth defendants through learned counsel Mr. Gurdit Singh and Mr. Ahmad Rosdi respectively, contended on substantially the same grounds. They said that the notice of appeal in encl. (32) was irregular as it was filed by the third plaintiff when there were three unrepresented plaintiffs, and since there were three separate orders, they should be three separate notices of appeal against each order.

They added that the writ and statement of claim had been filed by the first plaintiff for himself and the other two plaintiffs who were unrepresented, which was not allowed on the strength of s. 35(1) and s. 37(1) of the Legal Profession Act 1976.

They stressed that the plaintiffs being bankrupts who have not obtained the official assignee's sanction to commence this action lacked *locus standi*. They relied on *inter alia*, s. 38(1)(a) and (2) of the Bankruptcy Act 1967.

In my judgment, it is necessary to observe that when the learned registrar made the orders on 27 January 2003, the plaintiffs have not obtained the official assignee's sanction. However, *vide* letter dated 27 August 2003, such sanction has since been obtained by the plaintiffs from the official assignee's office.

In the circumstances, I hold that s. 38(1)(a) of the Bankruptcy Act 1967 has been satisfied and that the plaintiffs have the necessary *locus standi* to commence this action.

In respect of the plaintiffs' writ and statement of claim in encl. (1) and the notice of appeal in encl. (32) which were filed by the third plaintiff on his own behalf and also on behalf of the other two plaintiffs, I am of the view that the first plaintiff as a party is entitled to file these documents on his own behalf as this is expressly allowed as an exception to s. 37(1)(a) of the Legal Profession Act 1976 which, where relevant, reads as follows:

37. No unauthorised person to act as advocate and solicitor.

(1) Any unauthorized person who:

(a) acts as an advocate and solicitor or an agent for any party to proceedings or in any capacity, other than as a party to an action in which he is himself a party, sues out any writ, summons or process, or commences, carries on, solicits or defends any action, suit or other proceedings in the name of any other person in any of the Courts in Malaysia or draws or prepares any instrument relating to any proceedings in any such Courts;

(b) ...

shall be guilty of an offence ... (emphasis added)

Under s. 37(1)(a), it is an offence for an unauthorized person to act as an advocate and solicitor or an agent for any party to proceedings or in any capacity, "other than as a party to an action in which he is himself a party".

Since the third plaintiff is a party to the action herein and acting on his own behalf, there is nothing irregular in the writ and statement of claim as well as the notice of appeal which had been filed by him as a party.

The writ and statement of claim has specifically referred to the first and the second plaintiffs who are the parties herein. The third plaintiff is entitled at least to appear in person ie, on his own behalf.

A proper perusal of the notice of appeal reveals that it has referred to all the three orders made on the three enclosures in which case there is no reasonable likelihood of the defendants being prejudiced in any way whatsoever.

I am therefore unable to uphold the defendants' contention pertaining to plaintiffs' writ and statement of claim and notice of appeal.

(2) Limitation And Fraud

The stand taken for the plaintiffs was that the plaintiffs had 12 years to commence the action based on land transactions and allegations of fraud. They added that the action is not statute-barred.

It was submitted for the third and the fourth defendants that the facts showed a 10-year lapse and so the six-year limitation period has set in, on the basis of s. 6(1)(a) of the Limitation Act 1953.

Having considered these submissions, I hold that the issues as to whether the plaintiffs' action may be construed as an action to recover land within the ambit of s. 9 of the Limitation Act 1953 which sets a 12-year limitation period, or it is founded on a contract or tort so as to attract the six-year limitation period under s. 6(1)(a) are serious questions of law which can only be determined after hearing *viva voce* evidence at the trial.

Further, there are serious allegations of fraud which had been particularized and these particulars are to be resolved after full hearing, in order to determine, *inter alia*, the application of the limitation period under s. 29(a) or (b) of the same Act.

(3) Principles Governing O. 18 r. 19(1)(b), (c) Or (d)

Order 18 r. 19(1)(b), (c) or (d) on which the third and the fourth defendants rely reads, where relevant, as follows:

> **19 Striking out pleadings and indorsements (O. 18 r. 19)**
>
> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading ... on the ground that:
>
> (a) ...; or
>
> (b) it is scandalous, frivolous or vextious; or
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

In relying on O. 18 r. 19(1)(b), the defendants are in effect arguing that the plaintiffs' statement of claim is scandalous, frivolous or vexatious.

In *Boey Oi Leng (t/a Indah Reka Construction & Trading) v. Trans Resources Corporation Sdn Bhd* [2002] 1 CLJ 405, in the context of O. 18 r. 19(1)(b), I have the occasion to decide on the scope of the word "scandalous" as meaning wholly unnecessary or irrelevant.

As alluded to above, the fact that the plaintiffs have in their statement of claim brought the action against the defendants based on allegations of fraud relating to land transactions would require a full hearing in order to arrive at a proper conclusion.

Hence, I am unable to hold that the plaintiffs' action is scandalous in the sense of being wholly unnecessary or irrelevant.

Similarly, it cannot be said that the plaintiffs' action is frivolous or vexatious in the sense of being obviously unsustainable: see *Boey Ai Leng, supra*.

At the stage of hearing an application to strike out a statement of claim on the ground that it is obviously unsustainable, the court would not decide on the strength of the plaintiffs' action. The defendants have a heavy burden to prove that the plaintiff's action comes within O. 18 r. 19(1)(b): (see eg, *Stephen Kalong Ningkan v. Tun Abang Haji Openg & Tawi Sli (No. 2)* [1967] 1 MLJ 46; *Sarjit Singh Khaira v. Government of the State of Sarawak & Anor.* [1990] 2 CLJ 95; [1990] 3 CLJ (Rep) 59 HC.)

In respect of O. 18 r. 19(1)(c), the defendants must prove that the plaintiffs' statement of claim has included unnecessary pleading tending to prejudice, embarrass or delay the fair trial of this action by pleading beyond their right: *Knowles v. Roberts* [1888] 38 Ch. D 263, 270; per Bowen LJ; *Malaysian High Court Practice,* 1998 MLJ Desk Edn. p. 510 para 18.19.6.

A pleading is embarrassing where it is not clear what is being pleaded: *Mrs Kok Wee Kiat v. KLSE & Ors* [1979] 1 MLJ 171.

Upon a proper perusal of the plaintiffs' claim, I am unable to conclude that it comes within O. 18 r. 19(1)(c).

Is the plaintiffs' action an abuse of the process of the court under O. 18 r. 19(1)(d)? An abuse of the process of the court can arise under O. 18 r. 19(1)(d) when eg, the plaintiffs' use of the process of the court herein is not *bona fide*, which does not appear to be the case herein as the plaintiffs have a legitimate right to initiate and pursue the action against the defendants.

At this stage of the proceedings under O. 18 r. 9(1)(d), this court is not concerned with the plaintiffs' merits or chances of success in the action: *Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457.

It has been stated ever so often by our courts that it is only in absolutely plain and obvious cases that a plaintiff's claim or action or a party's pleadings would be struck out under any of the limbs of O. 18 r. 19(1): see eg, *Roslan bin Abdullah v. New Zealand Insurance Co. Ltd.* [1981] 2 MLJ 324 FC.

The weakness or demerits of the plaintiffs' action cannot *ipso facto* be a ground for striking out but it has to be proved, established or demonstrated that the specific requirements and terms contained in O. 18 r. 19(1)(b), (c) or (d) have been satisfied. (See eg, *Lian Keow Sdn. Bhd. v. Chelliah Paramjothy & Anor.* [1988] 1 CLJ 57; [1988] 1 CLJ (Rep) 729; *Tractors Malaysia Bhd. v. Tio Chee Hing* [1975] 2 MLJ 1; *Bandar Builder Sdn Bhd & 2 Ors. v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7).

(4) Entry Of Unconditional Appearance

I am unable to find any reply by the respective learned counsel for the third and the fourth defendants to the plaintiffs' contention that the defendants who have entered unconditional appearance have waived their right to invoke O. 18 r. 19.

In my judgment, the defendants' absence of response is hardly surprising, in the light of the judgment of the then Supreme Court in *Alor Janggus, supra*, delivered by Jemuri Serjan CJ (Borneo) (as he then was) to the effect that the defendants who have filed their unconditional appearance have thereby deprived themselves of the right to invoke O. 18 r. 19. (See also *Leong Peng Kheong, supra*, per Azmel J at p. 192 E-F).

2. Enclosure (30)

The plaintiffs' contention is that the plaintiffs' entry of judgment in default of the third defendant's defence is valid.

The response of the third defendant is that such a judgment could not be entered against him as it was for *inter alia* declaratory relief.

In my judgment, it is necessary to observe that the procedural law governing the entry of judgment in default of pleadings is to be found in O. 19 r. 2 to r. 5 and r. 7, and such a judgment may be given in the following circumstances:

(1) where the plaintiffs'claim is for a liquidated demand only (O. 19 r. 2);

(2) interlocutory judgment for damages to be assessed (O. 19 r. 3);

(3) interlocutory judgment:

(a) for the delivery of the property or the value to be assessed: O. 19 r. 4(a); or

(b) for the value of the property to be assessed: O. 19 r. 4(b); and

(4) for possession of the immovable property (other than a charge action under O. 83 r. 1): O. 19 r. 5(1).

None of the above applies to the factual background in the instant case. However, it would appear that O. 19 r. 7 is applicable here.

Under O. 19 r. 7, where the plaintiff makes against a defendant or defendants a claim of a description not mentioned in O. 19 r. 2 to r. 5 above, eg, for declaratory relief in this action, the plaintiffs may apply to the court for judgment in default of defence, and on the hearing of the application, the court shall give such judgment as the plaintiffs appear entitled to on their statement of claim: O. 19 r. 7(1).

Such an application must be by summons or motion: O. 19 r. 7(3).

Under O. 32 r. 1, the summons must be summons in chambers in Form 62.

If a plaintiff wishes to apply by way of a motion, he must invoke O. 8 which contains general provisions regulating the use of originating or other motions.

However, it is to be noted that the plaintiffs have failed to invoke O. 19 r. 7(1) and (3) in order to obtain judgment in default of defence against the third defendant. In the circumstances, I hold that the judgment in default of defence is irregular and ought to be set aside *ex debito justitiae*. Hence, I hold that the learned registrar is correct in setting it aside.

Conclusion

On the foregoing grounds, I allow the plaintiffs' appeal against the orders of the learned registrar made in respect of encls. (11) and (23). The orders of the learned registrar are hereby set aside.

In respect of encl. (30), I dismiss the plaintiffs' appeal and affirm the order of the registrar who has set aside the plaintiffs' judgment in default of defence.

In the light of the above circumstances, I order that the parties herein are to bear their own costs, here and before the learned registrar.

In view of the complexity of the action, the plaintiffs are certainly well advised to seek the services of an advocate and solicitor who is ready, able and willing to handle the action for them.